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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1075.

LESLIE D. STICKLER,
Petitioner,

v.

DAN TEHAN,
Sheriff of Hamilton County, Ohio,
Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioner prays that this Court grant a rehearing of its order of April 10, 1967, denying a petition for a writ of certiorari in this cause, _____ U. S. _____, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered herein on August 19, 1966, affirming the denial of petitioner's petition for a writ of habeas corpus by the United States District Court for the Southern District of Ohio, Western Division.

REASONS FOR GRANTING THE WRIT.

I. The Ohio Securities Act, Under Which Petitioner Was Convicted, Failed to Establish an Ascertainable Standard of Guilt, in Violation of the Due Process Clause.

Petitioner's conviction arose from transactions in promissory notes, alleged to have violated provisions of the Ohio Securities Act.[1] While the Act defines "securities" to include promissory notes,[2] such notes and commercial paper are "exempt when they are not offered directly or indirectly for sale to the public."[3]

Neither the Ohio statutes nor any administrative regulations define "public," and in this case, the notes were given in a series of loan transactions. There was no public solicitation of such transactions, and no promotion or advertising of petitioner's activities.[4] Promissory notes generally require securities registration in Ohio when they are in the nature of bond issues or other investment financing; not when they secure debts.[5] There was no way in which the petitioner could have known that he was selling notes to the public in violation of the Securities Act. Thus, his conviction violated the requirement of an ascertainable standard of guilt.[6]

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[1] Ohio Rev. Code § 1707.44, reproduced at p. 11a of the Appendix (hereinafter abbreviated "App") to the Petition for Certiorari (hereinafter abbreviated "P") in this cause.

[2] Ohio Rev. Code § 1707.01(B), reproduced at P. 9a-10a.

[3] Ohio Rev. Code § 1707.02(G), reproduced at P. 11a.

[4] See P. 15-16.

[5] *Cf. State v. Weger*, 25 Ohio L. Abs. 49 (Cuyahoga Ct. App. 1937), appeal dismissed 133 Ohio St. 23 (1937).

[6] See *Lanzetta v. New Jersey*, 306 U. S. 451 (1933); *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1921).

II. Petitioner Was Denied Effective Right of Counsel by Unfair Pretrial Tactics of the Prosecution, in Violation of the Sixth and Fourteenth Amendments.

Though petitioner's records were in the hands of the Federal District Court, in connection with bankruptcy proceedings, and though defense counsel was busily engaged in those proceedings,[7] petitioner was arraigned on fifteen indictments, and trial was set for thirty days thereafter.[8] Defense motions for continuance were overruled.[9] No indictment having been specifically scheduled for trial, defense counsel began to prepare a defense on the lowest numbered indictment.[10]

Eight days before trial, a prosecuting attorney notified defense counsel that the indictments would not be tried in numerical order,[11] and only two days before trial, the same prosecutor's office called defense counsel to trial in an entirely unrelated case, commencing one day prior to the scheduled trial in the instant case.[12] However, when defense counsel appeared for trial in the unrelated case, the same prosecutor's office refused to go forward, claiming to be unready.[13] Thus the scheduled trial date for this case was abruptly restored and defense counsel was forced to proceed despite his protests that he was not ready.[14] Despite the clear inference that he had been unfairly

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[7] R. 13a-14a.

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

[12] R. 15a.

[13] *Ibid.*

[14] *Ibid.*

maneuvered into proceeding without an opportunity to complete his preparation, even a single brief continuance was denied him.[15] Failure to afford counsel an opportunity to prepare a defense denied petitioner effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.[16]

III. Imposition Upon Petitioner of the Burden of Proving a Private Transaction Denied Him Due Process.

Merely upon the prosecution's proving that petitioner had delivered a promissory note, the burden shifted to petitioner to exculpate himself by showing that the note was private.[17] Since there is nothing inferentially criminal or even suspicious about the mere giving of a note, the Ohio law effectively makes an innocent act a prima facie crime. "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt * * *."[18]

IV. Petitioner's Conviction Upon Proof Offered to Show Sale of Investment Contracts Violated Due Process.

Although petitioner was indicted solely for transactions in promissory notes which would be exempt if private, in mid-trial the prosecution theory that the notes were really investment contracts (for which no private-transaction exemption is available) was injected over defense

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[15] *Ibid;* R. 307a-309a.

[16] *Powell v. Alabama,* 287 U. S. 45, 56-59 (1932); *Jones v. Kentucky,* 97 F. 2d 335 (6th Cir. 1938); *cf. Avery v. Alabama,* 308 U. S. 444, 446, 447-53 (1940).

[17] Bill of Exceptions, p. 119.

[18] *Speiser v. Randall,* 357 U. S. 513, 526 (1958).

objection.[19] The judge ultimately charged the jury to find petitioner guilty if, in effect, it found that the transactions were private dealings in investment contracts.[20] Thus, petitioner was convicted of a crime with which he had not been charged, in violation of well established due process principles.[21]

CONCLUSION.

For the foregoing reasons, petitioner urges this Court to grant a rehearing of his petition for a writ of certiorari in this cause and upon rehearing, to issue a writ of certiorari to review the judgment below.

Respectfully submitted,

BERNARD A. BERKMAN,
LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

JOSHUA J. KANCELBAUM,
Counsel for Petitioner.

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[19] R. 390a.

[20] R. 632a, 634a, 636a.

[21] *Cole v. Arkansas*, 333 U. S. 196 (1948); *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939); *cf. Bartell v. United States*, 227 U. S. 427 (1913).